

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 Advocates for Responsible Development and
4 John Diehl,

5 Petitioners,

6
7 v.

8 Mason County,

9
10 Respondent.
11

Case No. 06-2-0005

**COMPLIANCE ORDER
STORMWATER AND SEWERS
(September, 2009)**

12
13 THIS Matter came before the Board at a compliance hearing held on July 29, 2009 following
14 submittal of Mason County's Compliance Report.¹ The Compliance Report describes the
15 actions Mason County (County) has taken in response to the Board's Final Decision and
16 Order² (FDO) and most recent Compliance Order³. In that December 9, 2008 Compliance
17 Order, the Board found two remaining issues of noncompliance:

18 Conclusion of Law F: Because the County's six-year capital facilities plan does
19 not clearly identify sources of public money needed to finance the storm water
20 plans, it does not comply with RCW 36.70A.070(3)(d).

21 Conclusion of Law J: Mason County has failed to carry its burden of proof
22 pursuant to RCW 36.70A .320(4) that it no longer allows urban development
23 without the availability of urban services, and that all of its development
24 regulations no longer interfere with RCW 36.70A.020(2) and (12). MCC
25 17.02.030B (1) does not comply with RCW 36.70A.110(3) and RCW
26 36.70A.020(2) and (12).

27 **I. BURDEN OF PROOF**

28 After a board has entered a finding of non-compliance, the local jurisdiction is given a period
29 of time to adopt legislation to achieve compliance. RCW 36.70A.300(3)(b).
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31 ¹ Mason County's Compliance Report filed June 22, 2009.

32 ² Final Decision and Order dated August 14, 2006.

³ Compliance Order dated December 9, 2008.

1 After the period for compliance has expired, the board is required to hold a hearing to
2 determine whether the local jurisdiction has achieved compliance. RCW 36.70A.330(1) and
3 (2). For purposes of board review of the comprehensive plans and development regulations
4 adopted by local governments in response to a non-compliance finding, the presumption of
5 validity applies and the burden is on the challenger to establish that the new adoption is
6 clearly erroneous. RCW 36.70A.320(1),(2) and (3). If a finding of invalidity has been
7 entered, the burden is on the local jurisdiction to demonstrate that the ordinance or
8 resolution it has enacted in response to the finding of invalidity no longer substantially
9 interferes with the goals of the GMA. RCW 36.70A.320(4).
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12 In order to find the County's action clearly erroneous, the Board must be "left with the firm
13 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
14 121 Wn.2d 179, 201, 849 P.2d 646 (1993).
15

16 Within the framework of state goals and requirements, the boards must grant deference to
17 local governments in how they plan for growth:

18 In recognition of the broad range of discretion that may be exercised by counties
19 and cities in how they plan for growth, consistent with the requirements and goals
20 of this chapter, the legislature intends for the boards to grant deference to the
21 counties and cities in how they plan for growth, consistent with the requirements
22 and goals of this chapter. Local comprehensive plans and development
23 regulations require counties and cities to balance priorities and options for action
24 in full consideration of local circumstances. The legislature finds that while this
25 chapter requires local planning to take place within a framework of state goals
26 and requirements, the ultimate burden and responsibility for planning,
27 harmonizing the planning goals of this chapter, and implementing a county's or
28 city's future rests with that community. RCW 36.70A.3201 (in part).

29 In sum, the burden is on the Petitioner to overcome the presumption of validity and
30 demonstrate that any action taken by the County is clearly erroneous in light of the goals
31 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).
32 Where not clearly erroneous and thus within the framework of state goals and requirements,
the planning choices of the local government must be granted deference.

1 Only if a finding of invalidity has been entered is the burden on the local jurisdiction to
2 demonstrate that the ordinance or resolution adopted in response to the finding of invalidity
3 no longer substantially interferes with the goals of the GMA. RCW 36.70A.320(4).
4

5 In this case, the Board found that the County allowed commercial and industrial
6 development on holding tanks (a non- urban service) within the Allyn and Belfair Urban
7 Growth Areas⁴ (UGAs) and that substantially interfered with GMA Goals 2 and 12.
8

9 The County thus bears the burden of demonstrating that its development regulations no
10 longer substantially interfere with these goals. As to the other area of non-compliance, the
11 adequacy of the six year capital facilities plan, the Board did not find substantial interference
12 with the goals of the GMA, and therefore the burden of proving lack of compliance on that
13 issue remains with the Petitioners.
14

15 **II. ISSUE TO BE DISCUSSED**

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17 1. Whether the County has achieved compliance with the GMA with regard to those areas
18 found to be non-compliant in the Board's Compliance Order of December 9, 2008?
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20 2. Has the County removed the risk of substantial interference with the goals of the GMA
21 such that the Board's earlier finding of invalidity regarding the allowance of urban
22 development without the availability of urban services should be rescinded?
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24 **III. POSITIONS OF THE PARTIES**

25 **MCC 17.03.030 (Holding Tanks)**

26 The County states that on March 3, 2009 it adopted Ordinance 16-09, which deleted
27 language from MCC17.03.030 which allowed the use of holding tanks in specific
28 circumstances for industrial or commercial use. The County no longer allows for new or
29 expanded development using temporary holding tanks in the Allyn and Belfair UGAs.
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32 ⁴ MCC 17.03.030

1 The Petitioners do not dispute that the County achieved compliance by its actions.

2
3 Six Year Financing Plan (Stormwater)

4 Of concern to the Board was the County's lack of clear identification of the sources of public
5 money required to finance the stormwater utility. "The Capital Facilities Plan, including the
6 referenced Belfair and Allyn Stormwater Plans, provides no narrative that shows the
7 sources for funds in the grant category of the six-year plans."⁵ Ordinance 129-08 (the
8 Ordinance) was adopted by the County on December 9, 2008 and included amendments to
9 the Mason County Comprehensive Plan, Chapter VI, (Capital Facilities). The County states
10 the anticipated costs and financing of the stormwater utility are outlined in that Ordinance for
11 a six-year period beginning in 2009 and continuing through 2014.⁶ The following chart sets
12 forth the County's projected costs and financing:
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14

	2009	2010	2011	2012	2013	2014	Total
15 Project Management	27,000	12,000	6,000	30,000	30,000	30,000	135,000
16 Program Design & Implementation	264,500	139,500	36,000				440,000
17 Stormwater Project Design & Construction	370,000	195,000	150,000	275,000	315,000	360,000	1,675,000
18 Total Cost	661,500	346,500	192,000	305,000	345,000	390,000	2,250,000
19 Funding Sources:							
20 Real Estate Excise Tax (REET)	150,000	100,000	50,000	20,000	20,000	20,000	360,000
21 Developer contributions			10,000	10,000			20,000
22 Utility Fees & GFC				225,000	275,000	330,000	830,000

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32 ⁵ Compliance Order Storm Water and Sewers, December 9, 2008, p. 12.

⁶ Mason County's Compliance Report, p. 3.
COMPLIANCE ORDER STORMWATER AND SEWERS
Case No. 06-2-0005
September 3, 2009
Page 4 of 8

Grants/Loans	511,500	246,500	132,000	50,000	50,000	50,000	1,040,000
Total Funding:	661,500	346,500	192,000	305,000	345,000	400,000	2,250,000

The County states that it obtained a \$750,000 DOE grant, which it matched with \$250,000. Portions of that grant are used in 2009, 2010 and 2011. Beginning in 2012, and continuing through 2014, "Utility Fees and GFC" provide the bulk of required financing. At hearing the County identified "GFC" as "hookup costs". Additionally, the County states that it is unable to identify specific grant sources for the years 2012-2014 as the grant cycles for those years have not yet begun. On the other hand, the County asserts it has been successful in obtaining grants of substantially greater amounts in years past. Additionally, the County opines that the grant funds necessary for those years are relatively minimal and within the County's capacity to cover should grant funding not be forthcoming.

Petitioners argue the County failed to identify grant sources⁷ but stated the larger issue was the revised cost figures. They assert the County initially estimated costs of approximately \$400,000 for Allyn and Belfair alone, and now estimates costs of that magnitude for the entire county.⁸ They stated at hearing that the County has "manipulated" the figures.

Petitioners further argue the County admitted in its Comprehensive Plan that it is only "in the process of adopting stormwater plans for the Belfair/Allyn urban growth areas . . .". Consequently, Petitioners question the County's compliance with RCW 36.70A.070(3)(b), (c) and (d). Petitioners raise other broad concerns regarding the County stormwater utility planning, including identification of proposed locations and capacities of new or expanded stormwater facilities. Based on this alleged lack, Petitioners question the anticipated, projected costs.

⁷ Confusion regarding identification of funding sources arose for both Diehl and the Board at the compliance hearing as the County inadvertently failed to provide pages VI-82 and VI-83 from the Comprehensive Plan's Capital Facilities Element. Those pages were subsequently provided and add specificity.

⁸ Stormwater Management: Objections to a Finding of Compliance, filed July 6, 2009, p. 3.

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IV. DISCUSSION

The County has addressed and removed the GMA Goal 2 and 12 interference issue by deleting language from MCC 17.03.030, which allowed the use of holding tanks in certain circumstances for industrial or commercial use. The Petitioners do not dispute that. The Board finds the County has met its burden of proof by demonstrating its development regulations no longer substantially interfere with those goals.

The Petitioners bear the burden of proof as to the second compliance issue before the Board: whether the County has provided sufficient explanation of the anticipated sources of public funding to finance the six-year capital facilities plan. With the addition of pages VI-82 and VI-83 of the Comprehensive Plan's Capital Facilities Plan, together with the County's explanation of the "Utility Fees and GFC" category of funding, the County has provided sufficient detail to meet the requirements of RCW 36.70A.070(3)(d).

Although Petitioners question the County's compliance with RCW 36.70A.070(3)(b) and (c), meeting those requirements are not compliance issues before the Board. The Petitioners have failed to overcome the presumption of validity and demonstrate that the County's actions are clearly erroneous.

V. ORDER

The Board finds that Mason County has achieved compliance by appropriately identifying sources of public money needed to finance its storm water plans pursuant to the requirements of RCW 36.70A.070(3)(d) and that it no longer allows urban development without provision of urban services.

1 Therefore, the Board enters a finding of compliance, rescinds its prior finding of invalidity,
2 and orders this case closed.

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4 Dated this 3rd day of September, 2009.

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6 _____
7 William Roehl, Board Member

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9 _____
10 James McNamara, Board Member

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12 _____
13 Nina Carter, Board Member

14 Pursuant to RCW 36.70A.300 this is a final order of the Board.

15
16 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date
17 of mailing of this Order to file a petition for reconsideration. The original and three
18 copies of a motion for reconsideration, together with any argument in support
19 thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the
20 original and three copies of the motion for reconsideration directly to the Board, with
21 a copy to all other parties of record. **Filing means actual receipt of the document at**
22 **the Board office.** RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing
of a motion for reconsideration is not a prerequisite for filing a petition for judicial
review.

23
24 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
25 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
26 judicial review may be instituted by filing a petition in superior court according to the
27 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
28 Enforcement. The petition for judicial review of this Order shall be filed with the
29 appropriate court and served on the Board, the Office of the Attorney General, and all
30 parties within thirty days after service of the final order, as provided in RCW
31 34.05.542. Service on the Board may be accomplished in person or by mail, but
32 service on the Board means **actual receipt of the document at the Board office** within
thirty days after service of the final order. A petition for judicial review may not be
served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)